LIBRARY 135
SUPREME COURT, U.S.

No. [redacted]

Office-Supreme Court, U.S.
FILED
MAY 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

LEROY SILVERSTEIN and GEORGE HARRIS,
Petitioners,

vs.

CRAIG PHELPS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JULIUS LUCIUS ECHELES
30 N. LaSalle Street,
Chicago 2, Illinois
Attorney for Leroy Silverstein

FRANK W. OLIVER,
30 N. LaSalle Street,
Chicago 2, Illinois
Attorney for George Harris

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX

	PAGE
Opinion Below	2
Jurisdictional Statement	2
Questions presented for Review	3
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	11
Appendices:	
Appendix A—Opinion	13

Citations

In Re Luma Camera Service, 157 F.2d 951, 952	10
Maggio v. Feitz, 333 U.S. 56, 60, 64, 65	6, 10, 11
In re J. L. Marks & Co., 85 F.2d 392	11
Oriel v. Russell, 278 U.S. 358, 362-363	8, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

LEROY SILVERSTEIN and GEORGE HARRIS,
Petitioners,

vs.

CRAIG PHELPS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Leroy Silverstein and George Harris, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the seventh Circuit entered on March 15, 1963.

OPINION FROM THE COURT BELOW

On March 15, 1963, the United States Court of Appeals for the Seventh Circuit affirmed orders entered in the trial court holding petitioners in contempt of court for failure to comply with turnover orders entered in bankruptcy proceedings. The Court of Appeals opinion has not as yet been reported. It is printed herewith as Appendix A.

JURISDICTIONAL STATEMENT.

On February 9, 1962, the District Court affirmed an order of the referee in bankruptcy, requiring petitioners to turn over assets of bankrupt estate to the trustee in bankruptcy. Appeals were prosecuted from the order by each of the petitioners. Thereafter, on June 27, 1962, the District Court adjudged petitioners in contempt of court for failure to comply with the turnover orders, and sentenced them to the custody of the U.S. Marshal pending compliance with the turnover orders. Appeals were promptly taken from the orders finding petitioners in contempt and committing them to custody.

In the Court of Appeals, the appeals from the orders confirming the original turnover orders were consolidated with the appeal from the orders adjudging petitioners in contempt, and imprisoning them.

On March 15, 1963, the United States Court of Appeals for the Seventh Circuit affirmed all actions taken in the District Court. Petition for rehearing was denied on April 16, 1963.

The jurisdiction of this Court is invoked under Section 1254 (1) Title 28, U.S. Code.

QUESTION PRESENTED FOR REVIEW

Can a referee in bankruptcy require one subject to his orders to turn over property in a bankruptcy estate, absent any evidentiary showing or admission in the pleadings tending to establish that such person, at the time of the filing of the petition to require a turnover or at any subsequent time was possessed of or controlled any property of the bankrupt?

STATEMENT OF THE CASE.

In our statement of the case, references are to the appendix filed in this court, pursuant to Rule 21 (3). Appendix references take the form: (A. .....)

On March 13, 1961, Sterling-Harris Ford, Inc. was adjudged bankrupt. Respondent Craig Phelps was appointed Trustee (A. 1). Petitioners Silverstein and Harris were officers of the corporation (A. 4 and 9).

On May 11, 1961, the Trustee filed a petition for a turnover order against Silverstein and Harris. That petition (A. 1-2) alleged that when the petition for bankruptcy was filed on March 13, 1961, the bankrupt had $25,000 in a commercial bank account; that the bankrupt issued a check, dated March 13, 1961, for $25,000, payable to one Korem, who deposited the check in a personal account; that the money was the property of the bankrupt estate; that on March 15, 1961, Korem delivered to Silverstein and Harris checks in the amount of $7,500 each, which they knew to be property of the bankrupt estate; that at the time of the filing of the petition for a turnover order Silverstein and Harris had the sums in question in their possession or under their control. The Trustee sought an order directing Silverstein and Harris each to turn over the sums of $7,500 (A. 1-2).

Rules to show cause were issued by the referee in bankruptcy on March 11, 1961 (A. 2). Silverstein filed his answer, alleging that he and Harris redeemed outstanding corporate payroll checks with part of the money in his charge, paid outstanding bills owed by the corporation, and

reimbursed Silverstein for money owed to him by the corporation, so that the Trustee was not entitled to any of the money sought from him, Silverstein (A. 2).

Harris likewise filed a response to the proceedings against him, alleging *inter alia*, that at no time relevant to the proceedings, including the time of the filing of the petition in bankruptcy, the petition for a turnover order, and at all times intervening those dates and the date of his response did he possess or control funds of the bankrupt, and further alleging that at the time of filing his response, he was without any means whatever to discharge the $7,500 sum claimed by the Trustee in Bankruptcy (A. 7-8).

On June 14, 1961, the Referee issued his turnover order as to Harris (A. 9-11), on August 9, 1961, as to Silverstein (A. 13-17). These orders were sustained by the District Judge on February 9, 1962 (A. 18-19).

On June 7, 1961, the District Judge held the petitioners in contempt of court for failure to pay the sum of $7,500 as required by the turnover orders (A. 21-22).

REASONS FOR GRANTING THE WRIT

I.

The Trustee in Bannruptcy failed to present facts to show that Petitioner Silverstein possessed $7,500 at the time of the filing of the petition for turnover order.

Petitioners Silverstein and Harris both rely upon this court's Opinion in *Maggio* v. *Zeitz*, 333 U.S. 56, holding that turnover order may not be entered against a person, "... merely on proof that at some past time the property was in the possession or control of the accused party ..." (*Maggio*, p. 65)

The Court of Appeals, by its opinion, would revive the doctrine of continued possession supposedly laid to rest in *Maggio*, by merely requiring a showing by the trustee that at an earlier date a person had the property claimed, followed by the person's failure to produce a credible explanation as to what became of the property at some later date (Appendix A., p. 16).

The facts as to Silverstein were these: The Trustee showed that on March 15, 1961, a $7,500 check was drawn by one Korem, payable to Leroy Silverstein, and was presented for payment. There was no other "evidence," that on May 11 or June 8, 1961, the dates of the petition to turnover and the hearing thereon, that Silverstein possessed any of the $7,500.

Both the trustees and the referee relied upon the doctrine of "continuing possession." They did so in the teeth of *Maggio* v. *Zeitz*, 333 U.S. 56.

In reversing *Maggio*, this Court stated in part:

> "The only evidence that the goods then were in the possession or control of Maggio was the proof of his one time possession supplemented by a 'presumption' that, in the absence of a credible explanation by Maggio of his disposition of the goods, he continued in possession of them or their proceeds . . ." (*Maggio*, p. 60).

In laying to rest this dangerous presumption of continuing possession in punitive proceedings, this Court stated that there must be "clear and convincing evidence" to sustain a turnover order, and that it was "the burden of the trustee to produce the evidence, however difficult his task may be."

In the proceedings in the District Court, the referee had no evidence before him, nor did the Trustee offer evidence, from which it might be inferred that Silverstein possessed the money in question of May 11, 1961, the date the petition for the turnover order was filed, or on the later dates when the turnover order was entered by the referee. The only evidence tending to show that Silverstein had the money when the petition for a turnover order was filed, or at some subsequent date, followed, if at all, as an inference from his having had possession of it almost two months previously. But this requires the adoption of the very doctrine rejected by this court in the *Maggio* case namely, proof via the naked presumption of continuing possession.

Despite this court's imposition of the burden upon the trustee to produce the necessary evidence, however difficult his task, the Court of Appeals in the closing words of its opinion threw the burden of proof right back where your Honors in *Maggio*, stated it should not be. For the Court of Appeals Opinion states that "no credible explana-

tion of the whereabouts of the sums belonging to the Trustee was made." But this Court has held that it is not initially for respondents in turnover proceedings to offer credible explanations; rather it is for the trustee first to show that at the relevant dates the respondent in turnover proceedings *in fact* had the property in his possession. See *Oriel* v. *Russell*, 278 U.S. 358, 362-363.

II.

The pleadings, as construed by the Referee, did not provide a basis for finding petitioner Harris possessed property of the bankrupt at the time of the filing of the petition for a turnover order at any other time.

The trustee in bankruptcy petitioned for a turnover order on May 11, 1961. Harris' motion to strike was overruled, and so he filed responsive pleadings. On the basis of the pleadings, the referee entered the turnover order which in turn was affirmed by the District Court and ultimately provided the basis for the contempt order.

No evidence was offered by either side, nor were admissions made by either side save by their pleadings, nor were any stipulations entered into. Therefore the problem presented in this point is resolvable on the pleadings, consisting in the petition for a turnover order and Harris' response thereto.

The petition for a turnover order (A. 1) alleges in relevant part:

Paragraphs 1 to 4: the adjudication of bankruptcy on March 13, 1961 and the trustee's authority; that on March 13 the bankrupt issued a $25,000 check to one Korem, who deposited the check in his personal account.

Paragraph 5: that on March 15, 1961, Korem delivered to Harris a $7500 check payable to Harris, known by Harris to be property of the bankrupt estate. Paragraph 5 continues " . . . the check was subsequently presented for payment to [Korem's] and charged to [Korem's] account."

Only those five paragraphs of the petition for a turnover order were deemed by the referee to have been admitted by Harris, the referee stating: "The allegations of paragraphs one (1) to five (5) of the . . . petition . . . stand admitted . . ." (A. 10).

The final paragraph of the trustee's petition, paragraph 6, was not deemed by the referee to have been admitted (A. 9-11). It formed a conspicuous exception then, to those matters deemed admitted.

That paragraph alleged that Harris, at the time of the filing of the turnover order, possessed or controlled the said property of the bankrupt, in the sum of $7500. The referee did not deem paragraph 6 to have been admitted, and indeed could not, since Harris stated under oath that at no time alleged in the petition for a turnover order, and at no time relevant to the proceedings, including the time at which he filed his respective pleadings, did he possess or control funds belonging to the bankrupt (A. 8). He further stated under oath that he was then without any means whatever to discharge a debt of $7500 to anyone, including the bankrupt (A. 8).

It was thus that the referee properly refused to find that Harris admitted paragraph 6 of the petition for the turnover order, alleging the possession of funds of the bankrupt estate by Harris.

Yet that paragraph was the *only* paragraph alleging that Harris had the money at the time the turnover petition was filed and thereafter.

To justify a turnover order, the trustee was obliged to prove (a) that Harris wrongfully took bankruptcy property, and, (b) that he still possessed it, or its proceeds, when the Referee entered the turnover order. *In re Luma Camera Service*, 157 F. 2d 951, 952. The trustee further had the burden of proving possession by Harris at the time of filing the petition by "clear and convincing evidence" and not by a "mere preponderance of the evidence." *Oriel* v. *Russell*, 278 U. S. 358, 362-363.

In spite of the clear mandate of the cited cases, placing upon the petitioning trustee the burden of proving the material allegations of his petition, the referee apparently was persuaded that the trustee was not obliged to show (a) a wrongful taking and (b) present possession. For in his turnover order, paragraph 3 (A. 10) the referee refers to appellant Harris' "affirmative defense" (Harris' denial of present possession). Thus, the referee treated Harris' denial of paragraph 6 as affirmative matter, relieving the trustee of his burden of proof, and requiring Harris to adduce evidence that he did not have the money in question in his possession or control.

We remind the Court that paragraph 6 of the trustee's petition, which alleged Harris' continuing possession of the money in question was not deemed by the Referee to have been admitted. Yet that was the only allegation in the petition which averred that Harris had the money. In *Maggio* v. *Zeitz*, this Court reaffirmed the rule that the *trustee* must prove that money taken from a bankrupt estate is " . . . in the possession of the party proceeded against," 333 U.S. 56, 64. Yet, as noted, the Referee con

ceived that the trustee had no burden of proof and that Harris, by denying he had possession, assumed an affirmative burden.

Not only was the doctrine of continuing possession thoroughly discredited in *Maggio* v. *Zeitz*, 333 U.S. 56, 60, but the Court below, in the case of *In Re J. L. Marks & Co.*, 85 F. 2d 392, rejected such a theory. *Marks* held that proceeds of checks totaling $6500 could not be presumed to be in the possession of the person receiving them after four weeks. Here, the proceeds of $7500 checks could not be presumed to remain in petitioner's hands for the intervening two months before the filing of the petition for the turnover order, or three months when the turnover order was entered.

Thus the pleadings, as construed by the Referee, could not support the order entered, for the pleadings did not show that Harris retained the money up to and including the date of the turnover petition. Since the petitioning trustee failed to introduce any evidence to support of that crucial portion of his petition, the turnover order and subsequent orders predicated thereon ought properly to be set aside, and the Court of Appeals ought properly to have so held.

CONCLUSION.

For the foregoing reasons we respectfully submit that this petition for certiorari should be allowed.

Respectfully submitted,

JULIUS LUCIUS ECHELES,
Attorney for Leray Silverstein
FRANK W. OLIVER
Attorney for George Harris,
Petitioners.

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1962 JANUARY SESSION, 1963

Nos. 13757, 13758, 13871

IN THE MATTER OF
STERLING-HARRIS FORD, INC.,
Bankrupt,
LEROY SILVERSTEIN and GEORGE HARRIS,
Respondents-Appellants,
v.
CRAIG PHELPS,
Petitioner-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 15, 1963

Before SCHNACKENBERG, KNOCH and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This appeal involves turnover orders against Leroy Silverstein and George Harris, respondents-appellants. The matter arises out of a bankruptcy proceeding against Sterling-Harris Ford, Inc.

The turnover petition, filed on May 11, 1961, alleged that Sterling-Harris Ford, Inc. was adjudged a bankrupt on March 15, 1961; that at the time the petition for bankruptcy was filed, March 13, 1961, the bankrupt had $25,000 in a commercial bank account, and on that date issued its check for this amount, payable to one Richard E. Korem, who then deposited the check in a bank account maintained by him and his wife; that thereafter on March 15, 1961, Korem delivered to Harris the sum of $7,500 by check, and a similar amount by check to Silverstein; and that the money was the property of the bankrupt estate.

Silverstein answered by admitting he had received the $7,500 check and that a substantial portion of the proceeds was used to redeem payroll checks previously issued to the bankrupt's employees. He refused, however, to testify at the turnover hearing on the basis that his testimony might tend to incriminate him. He further refused to introduce any evidence in response to the petition. Harris likewise refused to testify or to introduce any evidence. His only response to the petition was in the form of "a response" which stated that "if respondent could testify without waiving his right to invoke the protection of the Fifth Amendment to the Constitution" he would deny that he possessed the funds of the bankrupt estate.

In addition to the responses, Silverstein filed a motion for a cange of venue from the referee and Harris, in his response, suggested that the referee disqualify himself. The referee denied the motion and suggestion and on June 14, 1961, issued the turnover order as against Harris followed by a similar turnover order against Silverstein on August 9, 1961.

Respondents filed petitions for review and Judge Robson, in a memorandum opinion affirming the orders of the referee, said:

> "This court concludes that there was clear and convincing evidence before the referee to show that the sums alleged were assets of the bankrupt when the bankruptcy petition was filed; that the instant petitioners acquired possession thereof, and that the brief interval of time since they acquired possession, and other evidence in the record, gave rise to the presumption that their possession continued down to the date of the turnover proceedings."

The referee and the district judge used the doctrine of "continued possession" in determining that respondents were yet in possession of the respective sums of money at the time of the turnover proceedings.

After notices of appeal from the orders of the District Court had been filed, the trustee moved for a referee's ceritficate that respondents had failed to obey the orders. The referee issued the certificate and on June 27, 1962, after each respondent had declined to offer any testimony on his behalf, the district judge entered orders holding both respondents in contempt.

Appeals from the initial turnover orders and the contempt orders were consolidated in this court.

We find no error in the record of the proceedings before the referee or the District Court.

Respondents contend that the referee should have disqualified himself because he had corresponded with agents of the Federal Bureau of Investigation and the United States Attorney in connection with possible violations by respondents of the Bankruptcy Act. They further contend that the referee had persistently ordered Silverstein to

answer questions under threat of a contempt citation should he fail to answer. 18 U. S. C. § 3057 provides that any referee having reasonable grounds for believing that violations of the Bankruptcy Act have been committed, shall report to the appropriate United States Attorney all of the facts and circumstances of the case. We also believe it appropriate to note that the referee offered full opportunity for the bankrupt's attorney to attend the conference with the United States Attorney. The referee's refusal to disqualify himself, under the circumstances, was completely proper.

With respect to Silverstein's petition for a change of venue, Section 22(b) of the Bankruptcy Act, 11 U. S. C. § 45(b), provides:

> "The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another."

In addition to our conclusion that justice did not require the referee to disqualify himself, we believe that the motion for a change of venue should have been directed to the district judge.

We also find no error in the referee's and District Court's application of the rebuttable doctrine of "continued possession." We recognize the words of caution enunciated by the United States Supreme Court in *Maggio* v. *Zeitz*, 333 U. S. 56 (1948), against the precipitate application of this doctrine "merely on proof that at some past time property was in the possession or control of the accused party . . ." (at 65). But the Supreme Court went on to say that "[u]nder some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession." We believe such a situation exists in the facts before us.

We are aware of Harris' and Silverstein's heavy reliance on their privilege against self-incrimination. We do not contest their privilege to rely on it but we do not believe they are entitled to use it as a sword permitting them to circumvent Rule 8(d) F. R. Civ. P.,[1] and thereby conceal the whereabouts of money belonging to the trustee in bankruptcy. As was so aptly stated in the recent case of *Sahn v. Pagano*, 302 F. 2d 629 (2nd Cir. 1962):

> "Pagano was free to avail himself of the privilege against self-incrimination but—whether or not an inference could be drawn from his doing so in a proceeding of this sort, see 8 Wigmore, Evidence (McNaughton rev. 1961), § 2272, at p. 439 & fn. 14—his claim that testimony would incriminate him cannot be transformed into a plausible assertion of innocence in the acquisition of the monies or an adequate denial of continued possession of them. . . ." (citing cases.) (at page 632).

No credible explanation of the whereabouts of the sums belonging to the trustee was made. The orders appealed from are affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

---

[1] "Effect of failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 20 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. [redacted] 135

LEROY SILVERSTEIN and GEORGE HARRIS,

Petitioners,

vs.

CRAIG PHELPS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JOHN H. BISHOP,
141 W. Jackson Boulevard,
Chicago 4, Illinois,
Attorney for Respondent.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

INDEX

	PAGE
Statement of the Case	1
Question for Review	3
Argument	4
Conclusion	8

AUTHORITIES

In re Fisher, 32 F. Supp. 69 (D. Md. 1940)	6
In re Victor's Ladies Shop, 45 F. Supp. 417 (E.D. Pa. 1940)	6
Maggio v. Zeitz, 333 U.S. 56 (1948)	4, 5, 6
Rossi v. United States, 289 U.S. 89 (1933)	6
Sahn v. Pagano, 302 F. 2d 629 (2nd Cir. 1962) Cert. denied 371 U.S. 819 (1962)	4, 7, 8
Sheinman v. Chalmers, 33 F. 2d 902 (3rd Cir. 1929)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 1104

LEROY SILVERSTEIN and GEORGE HARRIS,

Petitioners,

vs.

CRAIG PHELPS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

To: *The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:*

RESPONDENT'S STATEMENT OF THE CASE.

The respondent has found it necessary to restate the facts of the case, since the petitioners' statement is both inaccurate and incomplete.

The respondent, trustee of Sterling-Harris Ford, Inc., bankrupt, filed petitions for turnover orders (App. 1-2) against

each of the petitioners herein, Leroy Silverstein and George Harris. These petitions alleged that Silverstein and Harris had each received the sum of $7,500.00 which was the property of the bankrupt estate, and prayed that they be directed to deliver said sums to the trustee.

The only response made by Silverstein to the allegations of the trustee's petition was in the form of an "Answer" (App. 2), sworn to by the attorney for Silverstein, which admitted that he had received the $7,500.00 check and that a portion of the proceeds was used to redeem payroll checks previously issued to the bankrupt's employees. However, Silverstein refused to testify or introduce any evidence in response to the petition.

Harris likewise refused to testify or introduce any evidence. His only response to the allegations of the trustee's petition was in the form of a "Response" (App. 7-9), which stated that "if respondent could testify without waiving his right to invoke the protection of the Fifth Amendment of the Constitution", he would deny that he possessed funds of the bankrupt estate.

Based upon the pleadings, evidence introduced by the trustee and stipulated facts, the referee entered findings of fact, and issued turnover orders directing each of the petitioners to turn over the sum of $7,500.00 to the trustee. These orders were affirmed by the District Court.

The trustee then filed his petitions praying that the referee certify to the District Judge the fact that Silverstein and Harris had disobeyed the turnover orders. The referee issued his certificates. The District Judge then, after each petitioner had declined to offer any testimony on his behalf, adjudged both Silverstein and Harris in contempt for disobeyance of the turnover orders, and ordered that they be committed to the United States Marshal.

QUESTION FOR REVIEW.

The question here presented for review is whether, based upon the pleadings, evidence, exhibits and findings of the Referee, it was clearly erroneous for the District Court to have applied the rebuttable presumption of continued possession, in order to reach the conclusion of present control from proof of previous possession.

ARGUMENT.

The principles applicable to this cause were clearly stated by this Court in *Maggio* v. *Zeitz*, 333 U.S. 56 (1948). The Court below applied those principles in reaching its decision. The identical question was raised in the recent case of *Sahn* v. *Pagano*, 302 F. 2d 629 (2nd Cir. 1962), certiorari denied 371 U.S. 819 (1962).

No constitutional questions are involved. The petition does not suggest that any of the grounds for certiorari set forth in Supreme Court Rule 19 are present here. It is therefore essential that some "special or important reason" must exist to call for the exercise of the Court's discretion in granting the writ. It is submitted that no such reason exists.

The referee found that on March 15, 1961, Silverstein and Harris each received the sum of $7,500.00, property of the bankrupt estate. Under General Order in Bankruptcy No. 47, the findings of fact of a referee must be accepted, unless clearly erroneous. Neither the District Court nor the Court of Appeals found any error in these findings.

For the referee to have concluded that these funds remained in the hands of Silverstein and Harris at the time of the subsequent turnover proceedings, it was necessary for the referee to follow that chain of reasoning referred to by the Courts as the presumption of continued possession. The question is whether the referee's application of that chain of reasoning under the facts disclosed in this record is clearly erroneous.

The means for precluding the application of that chain of reasoning were available to both Silverstein and Harris, but they refused to make use of it. Their refusal to testify

as to the present possession of the funds, their silence, is clearly a circumstance which the trier of fact was entitled to consider in deciding whether they were, in fact, in possession of the property sought to be reached.

Petitioners take the position that the case of *Maggio* v. *Zeitz*, discarded and laid to rest the presumption of continued possession. The *Maggio* case involved contempt proceedings against one Joseph Maggio, president and manager of the bankrupt therein for failure to turn over certain assets which the Referee in Bankruptcy found to have been in his hands at the time of the entry of a turnover order upon him.

In that case it was proven that a shortage occurred in the bankrupt's stock of merchandise over a year before the turnover order was entered and that, at the time of the shortage, Maggio personally took possession of those assets. There was no evidence whatsoever that Maggio had present possession of the bankrupt's property. The lower courts felt bound to apply a rigid presumption of continuing possession and therefore found that Maggio had present possession of the bankrupt's property.

In vacating the judgments below and remanding the cause for further proceedings consistent with the opinion, this Court cleared the smoke which had surrounded the presumption of continuing possession. Your Honors pointed out that "* * * a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved" (p. 66), seemed to have developed into a "rigid presumption which it is said the lower courts apply without regard to its reasonableness in the particular case." (p. 65) The court made it clear that the presumption is not a rule of law, irrebuttable.

The Court did not preclude the application of the presumption of continuing possession in cases where its application is reasonable. The Court said:

> "• • • turnover orders should not be issued, or approved on appeal, merely on proof that at some past time property was in the possession or control of the accused party, *unless the time element and other factors make that a fair and reasonable inference.*"
>
> "Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession." (p. 65) (Emphasis ours)

Thus, the application by the lower courts of the presumption in *Maggio*, was on the basis of the facts presented by the record in that case unreasonable, and the Supreme Court so held.

In the instant case, the application of presumption is reasonable.

The petitioners urge that the trustee has not met his burden of proof. That the trustee has the burden of proof as to present possession is clear. However, the trustee need only establish a *prima facie* case; and at that point, the burden of going forward shifts to the respondent. *Sheinman v. Chalmers*, 33 F. 2d 902 (3rd Cir. 1929); *Rossi v. United States*, 289 U.S. 89 (1933); *In re Fisher*, 32 F. Supp. 69 (D. Md. 1940); *In re Victor's Ladies Shop*, 45 F. Supp. 417 (E.D. Pa. 1940).

From the fact that the funds were received by Silverstein and Harris on March 15, 1961, coupled with the fact that the petitioners stood mute and failed to introduce any evidence as to whether these funds were in their possession, it is reasonable to find as the referee did that the trustee has established *prima facie* that the petitioners had possession of the funds at the time of the turnover pro-

ceedings. At that point, the burden of going forward—of offering some evidence to explain—shifted to the petitioners. Petitioners failed to carry this burden.

The Harris proceeding is before the Court on the pleadings of the parties, consisting of the trustee's turnover petition and the response of George Harris. The only portion of that response which in any way refers to the trustee's petition states that "if respondent could testify without waiving his right to invoke the protection of the Fifth Amendment to the Constitution, he would state * * *" that he did not possess funds belonging to the bankrupt.

This statement certainly does not constitute a denial of any of the allegations of the trustee's petition. It was nothing more than a statement of what Harris would testify to upon the condition that by testifying he would not waive his privilege under the Fifth Amendment to the Constitution of the United States. Under Rule 8(d) of the Federal Rules of Civil Procedure, upon Harris' failure to deny, all of the allegations of the trustee's petition must be taken as admitted. The facts set forth in the trustee's petition clearly justify and support the referee's findings and order upon Harris to turn over the sum of $7,500.00 to the trustee.

This Court has denied certiorari in the recent case of *Sahn* v. *Pagano*, which is a case directly in point. Joseph Pagano, president of the bankrupt company, had received funds of the bankrupt totaling $745,000. He was asked what he had done with these funds, and he refused to answer on the ground that an answer might tend to incriminate him.

The Court of Appeals said:

> "Pagano was free to avail himself of the privilege against self-incrimination but—whether or not an inference could be drawn from his doing so in a pro-

ceeding of this sort, see 8 Wigmore, Evidence (McNaughton rev. 1961), §2227, at p. 439 & fn 14—his claim that testimony would incriminate him cannot be transformed into a plausible assertion of innocence in the acquisition of the monies or an adequate denial of continued possession of them, *Dittmar* v. *Michelson*, 281 F. 116, 117 (3 Cir.), cert. denied, 260 U.S. 738, 43 S. Ct. 95, 67 L. Ed. 489 (1922) * * * Accepting that the Referee and the Court in passing on the issue under * * * a turnover motion should * * * require clear evidence of the justice of such an order before it is made, *Oriel* v. *Russell*, 278 U.S. 358, 363, 49 S. Ct. 173, 73 L. Ed. 419 (1929), we think this test was met." (p. 632)

CONCLUSION.

The respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

JOHN H. BISHOP,
141 W. Jackson Boulevard,
Chicago 4, Illinois,
Attorney for Respondent.